93-861

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN L. CHEEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. May a defendant lawfully be convicted when, on remand of his case from the Supreme Court, the trial judge fails to instruct the jury in conformity with the Supreme Court's explicit holding?

2. When a citizen tries in good faith to obey the law, is that citizen entitled to read and study the Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION OF THE COURT BELOW 1

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT OF CERTIORARI .....

I. The trial court on remand failed to instruct the jury in conformity with this court's opinion ... 9

II. The defendant was deprived of important components of his affirmative defense by the trial judge's governing assumption that constitutionality was irrelevant 13

CONCLUSION 17

APPENDIX:

Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, August 23, 1993, *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993) ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Cheek v. United States, 498 U.S. 192 (1991) ..... *passim*

McLaughlin v. Commissioner, 832 F.2d 986 (7th Cir. 1987) 11

United States v. Powell, 936 F.2d 1056 (9th Cir. 1991), *amended*, 955 F.2d 1206 (9th Cir. 1992) 10

THE CONSTITUTION

Sixth Amendment, Constitution of the United States of America 2, 10

STATUTES

Title 18, U.S.C., Sec. 287 ..... 2, 4

Title 26, U.S.C., Sec. 6020 ..... 3, 10

Title 26, U.S.C., Sec. 7201 ..... 3, 4

Title 26, U.S.C., Sec. 7203 4

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner John L. Cheek respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 23, 1993.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993). It is set forth in the Appendix to this Petition.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on August 23, 1993 (*Appendix A*). In accordance with Rule 13.1 of the Supreme Court, this petition for a writ of certiorari was timely filed within ninety days of the date of the Seventh Circuit's decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES INVOLVED

18 U.S.C. Sec. 287 provides:

> Whoever makes or presents to any person or officer or to department or agency thereof, any claim upon the United States or any department or agency thereof, knowing such claim to be

false, fictitious, or fraudulent, shall be imprisoned not more than 5 years and shall be subject to a fine in the amount provided in this Title.

26 U.S.C., Sec. 6020 provides:

(a) PREPARATION OF RETURN BY SECRETARY. – If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

(b) EXECUTION OF RETURN BY SECRETARY. –

(1) AUTHORITY OF SECRETARY TO EXECUTE RETURN. – If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) STATUS OF RETURNS. – Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

26 U.S.C., Sec. 7201 provides in pertinent part:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall in addition to other penalties provided by law, be guilty of a

> felony and upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years or both, together with the costs of prosecution.

26 U.S.C., Sec. 7203 provides in pertinent part:

> Any person . . . required by this Title or by regulations made under authority thereof to make a return . . . who willfully fails . . . to make such return . . . at the time or times required by law or regulations shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 . . . or imprisoned not more than 1 year or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The District Court had jurisdiction over the petitioner under 18 U.S.C. Sec. 3231 pursuant to a superseding indictment charging violations of 26 U.S.C. Secs. 7201 and 7203, and 18 U.S.C. Sec. 287.

The District Court proceeding was the second criminal trial of petitioner John Cheek for willfully failing to file federal income tax returns and willfully attempting to evade his income taxes for most of the years between 1980 and 1986. His first trial took place in 1987; his conviction was affirmed by the Court of Appeals for the Seventh Circuit in *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989). Mr. Cheek's petition for a writ of certiorari was granted, and the Supreme Court reversed and

remanded his case for retrial. *Cheek v. United States*, 498 U.S. 192 (1991) (hereinafter, *Cheek*).

In *Cheek*, this Court held:

(I) The word "willfully" in the criminal tax statutes means the voluntary and intentional violation of a known legal duty. 498 U.S. at 201. The objective standard of reasonableness cannot be part of a factual determination whether a particular defendant knows his or her legal duty, for "it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty . . . " 498 U.S. at 203.

(II) A good faith belief that a tax statute is constitutionally invalid is not a defense to "willfulness," because claims of statutory invalidity "reveal full knowledge of the provisions at issue. . . . " 498 U.S. at 205.

The facts on remand that are pertinent to holding (I) of *Cheek* are as follows:

On remand, trial judge James B. Zagel instructed the jury:

> [Y]ou may consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith. (Tr. 1989)

In addition, Judge Zagel instructed the jury that Mr. Cheek's belief that Section 6020 permitted the Secretary of the Treasury to prepare a tax return for a person was "irrelevant." (Tr. 1980).

Judge Zagel had also allowed the prosecutor, Mr. Stephen Heinze, to emphasize and expand upon reasonableness in his closing argument to the jury:

> MR. HEINZE: As the evidence shows, one of the later arguments that Mr. Cheek came up with that he began to espouse around 1984, 1985, is that he John Cheek was not subject to taxes because he was a sovereign individual, a white Christian male, who didn't get his citizenship from the Fourteenth Amendment.
>
> Now, as I mentioned before –
>
> MR. CHEEK: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. HEINZE: As I mentioned before, I believe the Judge will instruct you that in deciding whether Mr. Cheek's stated beliefs were held in good faith, one of the things that you should consider – or may consider is whether they were in fact reasonable. This later justification that Mr. Cheek came up with around 1984 is undisputably unreasonable.
>
> And, by the way, even by some stretch of the imagination it were considered to be a reasonable belief, it's certainly not based on any part of the tax code, on any misunderstanding of the tax statutes that Mr. Cheek could have possibly had.
>
> So, again, as you will be instructed, that would not be a legitimate defense to the case – to the charges in this case.
>
> And when it did – when Mr. Cheek did make statutory objections, you've seen that he was no more reasonable in those –

> MR. CHEEK: I object to the word reasonable, Your Honor.
>
> THE COURT: Objection is overruled. (Tr. 1901-02)

Mr. Cheek, appearing *pro se* as he did in his first trial, was again convicted. Judge Zagel added to the sentence that had been imposed in the first trial new fines amounting to $62,000. Judge Zagel explained that "the fines are designed to reflect the Court's view of the increasing gravity of your conduct." (Tr. 2038)

The facts on remand that are pertinent to holding (II) of *Cheek* are as follows:

Throughout the trial, Judge Zagel excluded numerous items of evidence proffered by Mr. Cheek on the ground that these items involved questions of constitutionality. For example, when Mr. Cheek proffered various booklets and articles that he had relied upon in his study of the Constitution, Judge Zagel excluded nearly all of them. Mr. Cheek objected that the jury was entitled to see the tangible evidence of his considerable research into the Constitution. But Judge Zagel excluded such evidence on the ground that it dealt with questions of constitutionality. At one point, the judge indicated his inclination to disallow the text of the U.S. Constitution:

> THE COURT: Well, the trouble is if you give the constitution to the jury, I'm going to be in a position of telling them that if you – if they believe that your challenge is based upon the Constitution, you have no defense at all. . . . (Tr. 1081)
>
> It is in your interest, generally speaking, to de-emphasize those parts of your defense which

> hinges [sic] upon the Constitution because the Constitution is not something which you can use to shield you from the criminal prosecution in this case. And that's what the Supreme Court said in your case.
>
> That's why I am not going to let you put the Constitution in, and that's why even if I were to let you put it in, it's not a good idea for you to do that. (Tr. 1083)

Judge Zagel subsequently allowed his own Government Printing Office copy of the Constitution to be entered as a jury exhibit. (Tr. 1086) But he disallowed the copy of the Constitution proffered by Mr. Cheek, which consisted of a small booklet independently published by Mr. Cheek containing an accurate text of the Constitution with Mr. Cheek's underlining of provisions relating to taxation, and six pages of Mr. Cheek's summaries of leading court decisions and a brief essay by Mr. Cheek. (*Id.*) Judge Zagel explained: "Your constitutional booklet is clearly misleading." (Tr. 1085)

Further, Mr. Cheek testified that he attempted to comply with the law by asking attorney Robert Collins to give him an opinion letter regarding his tax liability. Judge Zagel told Mr. Cheek that the trouble with Collins' letter was that "the jury is going to know that none of this counts, because every word in Collins' letter has to do with the Constitution." (Tr. 1109) At the end of the trial, when Judge Zagel gave his instructions to the jury, he refused to give an advice-of-counsel instruction proffered by Mr. Cheek. Although there was little discussion during the instruction conference of the basis for denying Mr. Cheek's proffered instruction, the Government argued in

post-trial motions that the instruction was not applicable because attorney Robert Collins' opinion "addressed only Constitutional arguments against the tax laws" which "could not form the basis of any valid defense." (R. 289)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE TRIAL COURT ON REMAND FAILED TO INSTRUCT THE JURY IN CONFORMITY WITH THIS COURT'S OPINION.

This is an unprecedented, virtually unthinkable, case. In its *Cheek* decision in 1991, the Supreme Court reversed and remanded John Cheek's tax protester case. However, on remand, Mr. Cheek has been convicted pursuant to jury instructions that contravened this Court's explicit holding. The Seventh Circuit affirmed. *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993).

The Supreme Court held in *Cheek* that whether a taxpayer has acted "willfully" within the meaning of the federal criminal tax statutes is a question of fact for a jury. To prove willfulness, the government must show the defendant's actual awareness of the legal duty at issue. The Court said "it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty . . . " 498 U.S. at 203. Hence, the factual question for the jury is whether the defendant has a good faith belief, and not whether the belief itself is reasonable or rational. As pointedly summarized in a post-*Cheek* decision by the Ninth Circuit, "The test does not focus on the knowledge

of the reasonable person, but rather on the knowledge of the defendant." *United States v. Powell*, 936 F.2d 1056, 1061 (9th Cir. 1991), *amended*, 955 F.2d 1206 (9th Cir. 1992).

The Supreme Court observed that a contrary interpretation of "willfully" in the tax statutes "would raise a serious question under the Sixth Amendment's jury trial provision," adding: "It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions." 498 U.S. at 203.

Despite this Court's explicit holding, Judge James B. Zagel on remand charged the jury:

> [Y]ou may consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith. (Tr. 1989)

In addition, Judge Zagel instructed the jury that Mr. Cheek's belief that Section 6020 permitted the Secretary of the Treasury to prepare a tax return for a person was "irrelevant." (Tr. 1980). Thus Judge Zagel specifically ruled out, as a matter of law, jury determination of a crucial belief of Mr. Cheek about what the tax statutes required of him.[1] Not only did Judge Zagel's charges contradict the explicit holding in *Cheek*, but they came

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[1] Notably, the Court of Appeals, after correctly stating Mr. Cheek's contention that "by instructing the jury that a number of his beliefs were wrong or irrelevant, the court destroyed his defense based on a good faith belief in the legality of his actions," went on to omit from its quotation of Judge Zagel's instructions on Section 6020 the key word "irrelevant." See 3 F.3d at 1063.

piling in on top of a previous expansive argument about reasonableness delivered by the prosecutor, quoted above in the "Statement of the Case." The net result was that the jury was instructed by both the prosecutor and trial judge that the knowledge of a reasonable person, rather than the knowledge of the defendant, was the determining standard in this criminal case. The inescapable conclusion is that these instructions, jointly and severally, directly disregard the Supreme Court's holding in *Cheek*.

The trial judge's failure to act in conformity with the Supreme Court's teaching, and the Court of Appeals' affirmance of the trial judge's instruction to the jury, may in part be explainable when considered against the backdrop of their outright hostility to taxpayer protest cases in general and to Mr. Cheek in particular. The Seventh Circuit had previously characterized tax protesters as "thorns in the side of the federal judiciary." *McLaughlin v. Commissioner*, 832 F.2d 986 (7th Cir. 1987). In *Cheek*, this Court found that the Seventh Circuit was out of step with all the other circuits in its consistent attempts to erode the defense of criminal intent in taxpayer protest cases. Now, upon remand after the *Cheek* decision, it is apparent that the Seventh Circuit has not changed its mind. Not only did Judge Zagel disregard this Court's explicit teaching, but he also added to the sentence that had been imposed in the first trial new fines amounting to $62,000. Judge Zagel explained that "the fines are designed to reflect the Court's view of the increasing gravity of your conduct." (Tr. 2038.) What "conduct" of Mr. Cheek did the court have in mind? It certainly could not have been Mr. Cheek's conduct during the years 1980-86 covered by the indictment, since that was part of the unalterable past.

Nor can Judge Zagel fairly be assumed to have been referring to Mr. Cheek's conduct between his first and second trials, because right after his first trial Mr. Cheek filed tax returns, attempted to pay taxes, publicly repudiated any alleged connection with the tax protester movement, advised people to avoid that movement, counseled people to pay their taxes, indicated regret for his past conduct, and indicated his intent to be law abiding in the future which included the fact that he has filed tax returns for the past five years. (Tr. 2033-2035.) Thus Judge Zagel can only have been referring to the "increasing gravity" of Mr. Cheek's conduct in taking his tax protester case to the Supreme Court of the United States, winning in the Supreme Court, and defending himself at retrial.[2] Judge Zagel's action and his explanation for it reveal a desire to teach Mr. Cheek a harsh lesson by fining him $62,000 for exercising his due-process rights.

Counsel for Mr. Cheek has been unable to find any prior case in the history of the Supreme Court where its instructions were disregarded upon remand. If the Seventh Circuit's decision in the present case is allowed to stand, a new and dangerous precedent will be created –

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[2] Indeed, Judge Zagel indicated at the sentencing hearing his displeasure that Mr. Cheek would actually defend himself again at a retrial: "[T]here was an opinion of the Supreme Court of the United States [in *Cheek*] that did tell him after the first trial that his views were not a defense. In fact, you can look at the language of the Supreme Court and draw, I think, a fairly clear inference that the Supreme Court thought his arguments were worthless. And yet despite that opinion, which was unusual for any case, directed expressly to Mr. Cheek, because it was an opinion in his case, he still persisted." (Tr. 2016.)

that lower federal courts upon remand may refuse to obey the law of the case as determined by the Supreme Court. One can hardly conceive of an act more calculated to impair the constitutional authority of the Supreme Court within the federal judicial hierarchy. Accordingly, the Supreme Court may wish to consider the extraordinary remedy of summary reversal. In the alternative, certiorari should be granted on the ground that this case is clearly "important" within the meaning of Rule 10 of the Rules of Practice of the Supreme Court of the United States.

II. THE DEFENDANT WAS DEPRIVED OF IMPORTANT COMPONENTS OF HIS AFFIRMATIVE DEFENSE BY THE TRIAL JUDGE'S GOVERNING ASSUMPTION THAT CONSTITUTIONALITY WAS IRRELEVANT.

The second part of the Supreme Court's ruling in *Cheek* considered whether a good faith belief that a tax statute is constitutionally invalid would be a defense to "willfulness." The Court held that claims of statutory invalidity "reveal full knowledge of the provisions at issue," and hence are "irrelevant to the issue of willfulness." 498 U.S. at 205-206.[3]

On retrial, it was apparent that the *Cheek* decision may have operated to encourage the trial judge to deny

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[3] Justice Scalia, concurring, found it "impossible to understand" that a taxpayer's belief in the nonexistence of a statutory prohibition excuses liability, but belief in the legal nonexistence of a statutory prohibition (that is, belief that the statute is constitutionally invalid) does not excuse liability. 498 U.S. at 208.

Mr. Cheek his right to present important evidence showing that he did not voluntarily nor intentionally violate a known legal duty. What happened was that the trial judge failed to draw a distinction between evidence regarding Mr. Cheek's conclusions of constitutional validity (which was clearly excludable as a matter of law) and evidence tending to support Mr. Cheek's claim that he did not voluntarily nor intentionally violate any known legal obligation. Yet Mr. Cheek should have been allowed to present, as a matter of his affirmative defense, evidence that he was attempting in good faith to discover and understand the law and to comply with it. One important source of the law he read and studied was the Constitution of the United States. Like any American citizen, Mr. Cheek should have been allowed to submit evidence showing his care in reading, studying, and relying upon the Constitution. There was no logical reason for him to make the further claim – and indeed, he did not make it – that a particular tax statute is constitutionally invalid. For it is certainly possible for Mr. Cheek or anyone else to read the Constitution without ever reading a single tax statute. His affirmative defense was, simply, that he read and studied the Constitution in good faith in his attempt to avoid voluntarily or intentionally violating any tax obligation. The burden was on the Government to show that Mr. Cheek was aware of the various tax statutes he was indicted for violating. So long as Mr. Cheek did not claim that he believed a particular tax statute to be constitutionally invalid, the Government could not fairly charge him with knowing the content of a particular tax statute on the mere ground that he had read and studied the Constitution. Only a claim of

invalidity might have implied that the claimant knew the content of a tax statute – a claim that Mr. Cheek did not make.

The failure of the trial judge to make the aforementioned distinction resulted in prejudicial error. Thus, for example, when Mr. Cheek proffered various booklets and articles that he had relied upon in his study of the Constitution, Judge Zagel excluded nearly all of them. Mr. Cheek believed that the jury was entitled to see the tangible evidence of his considerable research into the Constitution. One of the booklets disallowed by Judge Zagel had been admitted into evidence in Mr. Cheek's first trial in 1987 – a small pamphlet published independently by Mr. Cheek containing an accurate text of the Constitution with Mr. Cheek's underlining of provisions relating to taxation, and six pages of Mr. Cheek's summaries of leading court decisions and a brief essay by Mr. Cheek. (Tr. 1086) This booklet, reflecting the intensity and sincerity of Mr. Cheek's study of the Constitution (though not scholarly by professional standards) was an important component of Mr. Cheek's showing that he was not guilty of voluntarily nor intentionally trying to violate any legal obligation. However, Judge Zagel excluded it, explaining: "Your constitutional booklet is clearly misleading." (Tr. 1085.)

Another example was Mr. Cheek's testimony that he attempted to comply with the law by asking attorney Robert Collins to give him an opinion letter regarding his tax liability. Judge Zagel's reaction is recounted in the "Statement of the Case," above, with the result that an important part of Mr. Cheek's defense may have been taken away from him because the trial judge did not or

could not draw a distinction between the legal question whether the constitutional arguments presented by Mr. Collins in his memorandum were sound, and the factual question whether Mr. Cheek obtained and relied upon that memorandum in a good-faith attempt not to voluntarily nor intentionally violate any legal requirement, statutory or otherwise, concerning taxation.

It may be that the Supreme Court's emphasis on the concept of validity in the *Cheek* case had the practical effect of encouraging the trial judge, on remand, to find irrelevant as a matter of law all evidence about constitutionality proffered by Mr. Cheek. Surely if Mr. Cheek had proffered evidence that he relied on the prophesies of Ezekiel in forming his beliefs about taxpayer obligations – accompanied perhaps by supporting letters from Biblical theologians – he would have been entitled to present his evidence. A jury might not have believed him, but at least he would have had a right to make an affirmative case consisting of evidence of his own choosing to show that his state of mind did not include intent to violate any lawful tax obligation. Why, then, should the Constitution of the United States be less relevant to Mr. Cheek's defense than the Book of Ezekiel?

Mr. Cheek is entitled to read, study, and absorb the provisions of the Constitution. He is entitled to present evidence of his study of the Constitution to support a claim that he did not voluntarily nor willfully violate a known legal duty. To the extent that the Supreme Court's decision in *Cheek* may have been construed or misconstrued by the trial judge to deprive Mr. Cheek of his right to present any evidence that tended to negate a mental state of willfulness, the Court may wish to clarify

the opinion in *Cheek* so that it will not present similar conceptual difficulties to trial judges in the future.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN L. CHEEK,
Defendant-Appellant.

No. 92-1668

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

3 F.3d 1057 (7th Cir. 1993)

Argued June 7, 1993.
Decided August 23, 1993.

SUBSEQUENT HISTORY: As Corrected August 27, 1993.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 87 CR 161. James B. Zagel, Judge.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee, Bary R. Elden, AUSA, OFFICE OF THE UNITED STATES ATTORNEY, Criminal Receiving, Appellate Division, Chicago Il.

For JOHN L. CHEEK, Defendant-Appellant, Cynthia Giacchetti, Chicago, IL.

JUDGES: Before BAUER, Chief Judge and KANNE, Circuit Judge and ALDISERT, Senior Circuit Judge. *

* Ruggero J. Aldisert, of the United States Court of Appeals for the Third Circuit, sitting by designation.

OPINION: ALDISERT, Senior Circuit Judge.

Like most of us, John Cheek, does not like to pay taxes. Unlike most of us, however, he has refused to pay them. As a result of his refusal to pay federal income taxes, Mr. Cheek has been a frequent visitor to our courts.

On several occasions, Mr. Cheek has attempted to persuade the district courts of this Circuit and, on one occasion, this court to declare federal income taxes and the withholding of Social Security and tax contributions unconstitutional. Not only were his attempts unsuccessful, but he was required to pay $1,500 in attorney's fees, $5,000 in sanctions under Rule 11, Federal Rules of Civil Procedure, for filing a frivolous lawsuit and $1,500 as sanctions under Rule 28, Federal Rules of Appellate Procedure, for filing a frivolous appeal.[1]

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[1] See, e.g., Schaut v. United States, 585 F.Supp. 137 (N.D. Ill. 1984) (Cheek was one of five unsuccessful plaintiffs filing a complaint at No. 82 C2304 alleging that the withholding of taxes from their wages and payment of those taxes violated the Sixteenth Amendment); Cheek v. Doe, 110 F.R.D. 420 (N.D. Ill. 1986) (Cheek unsuccessfully filed a complaint at No. 85 C 10351 contending that the withholding of income and social security taxes amounted to an unconstitutional taking and that wages are not taxable income. He was ordered to pay the United States $1,500 in costs and attorney's fees and $10,000 as a Rule 11 sanction for filing a frivolous lawsuit. On appeal, 828 F.2d 395 (7th Cir.), cert denied, 484 U.S. 955 (1987), we affirmed the dismissal, reduced the sanction to $5,000 to comport with the maximum amount the Tax Court may levy, and imposed a Rule 28 sanction of $1,500 for filing a frivolous appeal.); see also Cheek v. Internal Revenue Serv., 703 F.2d 271 (7th Cir. 1983) (Cheek unsuccessfully attempted to obtain confidential tax return information from the IRS under the Freedom of Information Act, 5 U.S.C. @ 552).

Mr. Cheek has been party to criminal proceedings before us as well. In 1987, Cheek was charged in a superseding indictment with six counts of willfully failing to file a federal income tax return for the years 1980, 1981, and 1983 through 1986, in violation of 26 U.S.C. @ 7203. He was further charged with three counts of willfully attempting to evade his income taxes for the years 1980, 1981 and 1983 in violation of 26 U.S.C. @ 7201. On November 12, 1987, Cheek was convicted by a jury on all counts and sentenced to jail for a year and a day. On appeal, we affirmed his conviction, United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989), but the Supreme Court reversed it on the basis of erroneous jury instructions, Cheek v. United States, 498 U.S. 192, 112 L. Ed. 2d 617, 111 S. Ct. 604 (1991), the Court holding that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, irrespective of whether the claimed belief is objectively reasonable.

In 1992, following a second jury trial before another district judge, who instructed the jury in strict accordance with the Supreme Court's new formulation of willfulness, Cheek was again convicted on all counts, was sentenced to jail for a year and a day and was fined $62,000. It is from the conviction upon retrial and sentence that he now appeals.

Other questions are presented, but essentially Cheek argues that the district court erred by refusing to instruct the jury on a reliance of counsel defense, that his due-process rights were violated when a heavier penalty was imposed after his second trial, and that his indictment should have been dismissed because the time limitations

of the Speedy Trial Act were not observed. We will affirm the judgment of the district court in all respects.

Jurisdiction was proper in the trial court based on 18 U.S.C. @ 3231. This court has jurisdiction under 28 U.S.C. @ 1291 following the filing of a timely appeal under Rule 4(b) of the Federal Rules of Appellate Procedure.

I.

Cheek had been a pilot for American Airlines since 1973 and filed federal income tax returns through 1979 but thereafter ceased to file returns, except for 1982, when he filed a frivolous return. Prior to 1980, while employed by American Airlines, Cheek filed an Internal Revenue Service W-4 form claiming 25 withholding allowances. In 1980, he changed the number of withholding allowances on his W-4 first to 39 and then to 60.[2] The IRS and Cheek exchanged correspondence regarding his bizarre W-4 forms. The IRS eventually sent a letter to Cheek stating that his W-4 with 39 exemptions was unacceptable. In December of 1980, an American Airlines tax attorney advised Cheek that he was not exempt from withholding and suggested that he seek advice of competent counsel.

From 1981 through 1984, with Cheek continuing to file W-4 forms claiming totally exempt status, Cheek and American Airlines corresponded regularly. Eventually, the IRS notified American Airlines not to honor the W-4s filed by Cheek, and American Airlines thereafter withheld the proper deductions from Cheek's wages. What

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[2] Cheek received wages as an American Airlines pilot in the amount of $67,221.61 in 1983 and $75,145.75 in 1984.

followed over the course of several years was a series of lawsuits filed by Cheek against various defendants, including his employer, individual employees of American Airlines, the Commissioner of Internal Revenue and various IRS employees, in an attempt to prevent the withholding of any taxes from his wages. For example, in 1984 he joined with others in an abortive attempt to seek a judgment against the Commissioner of Internal Revenue declaring that the withholding of taxes from their wages and the payment of these taxes violated the Sixteenth Amendment. Schaut v. United States, 585 F. Supp. 137 (N.D. Ill. 1984). In 1985, he sued several IRS employees, seeking reimbursement of income and social security taxes withheld by American Airlines, contending that "the withholding of income and social security taxes amounted to an unconstitutional taking of property and that his wages [were] not taxable income." Cheek v. Doe, 110 F.R.D. 420, 421 (N.D. Ill. 1984). All of these suits were dismissed with prejudice.

Cheek described his various lawsuits as an attempt to prove his belief that the law did not require him to pay tax on what he described as his right to work. In addition to pursuing his own lawsuits, Cheek also attended the criminal tax trials of various friends and associates. All of these trials resulted in convictions. See United States v. Kalita, 712 F.2d 1122 (7th Cir. 1983).

Cheek testified that many of his actions were based on legal advice. Throughout the time period covered in the indictment, Cheek claims to have conferred with several attorneys regarding his research, beliefs and lawsuits.

On March 13, 1992, after his second trial, Cheek was sentenced by Judge Zagel to one year and one day imprisonment, and he was placed on five years probation. The conditions of probation were that he cooperate with the IRS in a civil determination of his tax liabilities, that he pay all back taxes, interest and penalties, and that he file current tax returns. Finally, Cheek was ordered to pay a fine of $ 62,000 immediately, a fine that included costs of incarceration and supervision.

The sentence imposed by Judge Zagel in the second trial was essentially the same as that imposed by Judge Plunkett in the first trial, except for the imposition of the fine.

II.

The standards utilized in reviewing the issues presented are familiar. " 'Whether a jury has been properly instructed is to be determined not upon consideration of a single paragraph, sentence, phrase or word, but upon the charge as a whole.' " United States v. Doerr, 886 F.2d 944, 960 (7th Cir. 1989) (quoting United States v. Alexander, 743 F.2d 472, 478 (7th Cir. 1984)). So long as the instructions " 'treat the issues fairly and accurately,' they will not be disturbed on appeal." Id. (quoting United States v. Thibodeaux, 758 F.2d 199, 202 (7th Cir. 1985)). If the defendant fails to object to a jury instruction in the trial court, the standard of review is plain error. United States v. Windsor, 981 F.2d 943, 946 (7th Cir. 1992). "A plain error is not just one that is conspicuous but one whose correction is necessary to prevent a 'miscarriage of

justice.' " United States v. Young, 470 U.S. 1, 15 and n. 12, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985).

In reviewing the district court's refusal to give Cheek's proposed jury instruction, we seek to determine if Cheek was prejudiced by the refusal. United States v. Grier, 866 F.2d 908, 932 (7th Cir. 1989). However, "in order to preserve for appeal an objection to a district court's refusal of a proposed jury instruction, 'a defendant must object, on the record, to the judge's refusal to tender the defendant's instructions, and must clearly state the reasons for his or her objections.' " United States v. Marrinson, 832 F.2d 1465, 1473 (7th Cir. 1987) (quoting United States v. Douglas, 818 F.2d 1317, 1320 (7th Cir. 1987), cert. denied sub nom. Pruitt v. United States, 493 U.S. 841, 107 L. Ed. 2d 87, 110 S. Ct. 126 (1989)). Merely submitting alternative instructions is not sufficient. Id. If the objection does not amount to a clear statement, then the district court's refusal to tender an instruction must be analyzed under the plain error standard of review. Id.

Congress has mandated that the clearly erroneous standard of review be applied to findings of fact in the sentencing context. 18 U.S.C. @ 3742(e); see also United States v. Beal, 960 F.2d 629, 632 (7th Cir.), cert. denied, 121 L. Ed. 2d 166, 113 S. Ct. 230 (1992).

"Our determination of whether the Speedy Trial Act was violated requires us to review the district court's interpretation of that act." United States v. Montoya, 827 F.2d 143, 146 (7th Cir. 1987). Thus, an appellate court reviews de novo a district court's speedy trial calculation. United States v. Nesbitt, 852 F.2d 1502, 1512 (7th Cir.

1988), cert. denied, 488 U.S. 1015, 102 L. Ed. 2d 798, 109 S. Ct. 808 (1989).

III.

Cheek first argues that the district court erred in its jury instructions in three respects: in refusing to give an instruction based on an advice of counsel defense, in not properly instructing according to the Supreme Court's teachings in Cheek and in not instructing as to the appropriate use of certain evidence.

A.

At trial Cheek testified that his actions after 1982 were the result of "bum legal advice." Tr. at 1140. He argues that three different attorneys advised him that the tax system was based on voluntary compliance and that his many previous lawsuits were dismissed for procedural rather than substantive reasons.[3]

Under these circumstances, he contends that he was entitled to a jury instruction on the advice of counsel defense.

According to the government, the evidence presented by Cheek fell short of satisfying the requirements of the defense. It contends that Cheek sought confirmation of

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[3] In Cheek v. Doe, 110 F.R.D. at 421, the district court specifically stated that regardless of its procedural inadequacies, "this case is frivolous on the merits. The constitutionality of the income tax laws, enacted pursuant to the Sixteenth Amendment, has long been established."

his own view of the tax laws rather than independent legal advice, that he sought such opinions after he had already chosen his course of conduct, that several attorneys told him that his conduct could lead to criminal sanctions, and that the majority of the testimony undermined rather than supported the advice of counsel defense.

In order to establish an advice of counsel defense, a defendant must establish that: (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report. Liss v. United States, 915 F.2d 287, 291 (7th Cir. 1990). A crucial element in this defense is that "defendant secured the advice on the lawfulness of his possible future conduct." United States v. Polytarides, 584 F.2d 1350, 1352 (4th Cir. 1978).

Cheek testified that he received the advice of at least three different attorneys on the status of the tax laws, but we are not satisfied that he sought or received advice on "possible future conduct." He did not seek any advice until after 1980, when he first failed to file proper tax returns. Furthermore, Cheek had been told by the IRS, American Airlines personnel and by at least one court that his contentions were without merit prior to his

discussions with counsel.[4] Reduced to its essence, the record indicates that Cheek merely continued a course of illegal conduct begun prior to contacting counsel. See Polytarides, 584 F.2d at 1353 (good faith reliance on advice of counsel defense was not available when defendant had taken significant steps toward the illegal activity and had been warned of its illegality prior to seeking advice of an attorney). In addition, at least one attorney, Robert L. Collins, testified that Cheek sought his opinion solely for the purpose of protecting himself in the event he was indicted. Tr. at 721.

Nowhere does Mr. Cheek contend either that he made a full and accurate report as to his tax status to any attorney or that he "acted strictly in accordance with the advice of his attorney." In United States v. Becker, 965 F.2d 383, 388 (7th Cir. 1992), cert. denied, 122 L. Ed. 2d 783, 113 S. Ct. 1411 (1993), we held that an advice of counsel instruction was unwarranted where there was no evidence that the defendant fully disclosed his position to his lawyer or that he followed the specific advice of his attorney. Defendant Becker attempted to rely on a legal memorandum from attorney Collins discussing the constitutionality and voluntary nature of the current tax system, the same exact memorandum Cheek relies on here.

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[4] Cheek attended the trial of Henry J. Kalita, who was indicted for willfully failing to file tax returns. Kalita defended his conviction on Fourth and Fifth Amendment grounds. He was indicted in 1981 and convicted on all counts in early 1982. See United States v. Kalita, No. 81 CR 127, 1985 WL 1970 (N.D. Ill. June 28, 1985).

Moreover, attorney Susan Keegan testified that she discussed with Cheek "more or less" that he was required to obey the law until he was told by a court that the law in question was not valid. Tr. at 900. He admittedly did not follow this advice. Attorney Andrew Spiegel testified that he told Cheek that the courts were interpreting the tax laws as requiring the filing of income tax returns, that wages were considered income subject to taxation and that it was possible that Cheek would be prosecuted criminally for not filing a tax return. Tr. at 579-81. Attorney Adrian Flipse told Cheek that she could not prove his theory of taxation one way or the other.

None of these attorneys advised him not to file tax returns. To the contrary, each advised him that he might be criminally prosecuted if he failed to file. See, e.g., Tr. at 855 (attorney Keegan); Tr. at 580 (attorney Spiegel). Accordingly, on the basis of the evidence presented, the district court did not err in refusing to give a jury instruction on the advice of counsel defense.

B.

The government contends also that even if the evidence could be construed to support the theory of good faith reliance on counsel, the jury instructions as a whole were sufficient to encompass that theory. It is well settled that a criminal defendant is entitled to have the jury " 'consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous.' " United States v. Kelley, 864 F.2d 569, 572 (7th Cir.) (quoting United States v. Grimes, 413 F.2d 1376, 1378 (7th Cir. 1969)), cert. denied, 493 U.S. 811

(1989). He is not entitled, however, to a particular instruction on that theory. "The defendant is entitled only to have his theory, if supported by the evidence, considered by the jury." Id.

The tax offenses with which Cheek was charged are specific intent crimes that require the defendant to have acted willfully. Thus, the district court instructed the jury that, in order to find him guilty, they had to find that the defendant acted knowingly and willfully. The court defined "willfully" as meaning the "voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires." Tr. at 1980. The jury was further instructed that a "defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law." Tr. at 1989. According to the government, this instruction on willfulness necessarily encompassed Cheek's theory of good faith reliance on counsel's advice.

In United States v. Kelley, 864 F.2d at 573, we determined that the district court's instructions on willfulness encompassed the defendant's theory of good faith reliance on counsel's advice, thus obviating the need for an additional instruction. In Kelley, the district court had defined willfully as "voluntarily and intentionally with the purpose of avoiding a known legal duty." Id.

We are satisfied that on the basis of the trial record the court's instructions did "treat the issues fairly and accurately," and, therefore, they should not be disturbed on appeal. Doerr, 886 F.2d at 960 (quoting Thibodeaux, 758 F.2d at 202).

C.

We also conclude that the court properly instructed the jury on "willfulness" and reject Cheek's contention that the district court erred by focusing the jury on the objective factor of "reasonableness." The court instructed, inter alia: A defendant does not act willfully if he believes in good [faith] that he is acting within the law or that his actions comply with the law. Therefore, if defendant actually believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to willfully evade or defeat taxes or to willfully fail to file tax returns. This is so even if defendant's belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith. Tr. at 1989.

In United States v. Becker, 965 F.2d at 388, this court found a virtually identical instruction to be "an accurate summary of Cheek that appropriately focused the jury's attention on whether the defendant had a good-faith belief he was acting lawfully." In Cheek, 498 U.S. at 203-204, the Court noted that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws."

D.

In a related argument, Cheek contends that by instructing the jury that a number of his beliefs were

wrong or irrelevant, the court destroyed his defense based on a good faith belief in the legality of his actions. Specifically, he claims that the court erred by telling the jury that his belief that Section 6020 permitted the Secretary of the Treasury to prepare a tax return for a person did not negate "in any way" the obligation to file a tax return. In Cheek, 498 U.S. at 206, the Court specifically held that "in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper."

On retrial, the court here did not say that Cheek's understanding of the law was irrelevant but rather that his view did not accurately reflect the state of the law. See United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992) (the jury cannot be allowed to decide on its own whether Section 6060(b) somehow makes lawful the failure to file a return; therefore, the district court must make the unlawful conduct clear). The district court did not commit error by instructing the jury as to the actual state of the law.

E.

In addition, Cheek questions the court's jury instructions regarding the use of certain evidence to determine his state of mind. During the trial, the government introduced various judicial rulings, including the opinions filed in the cases in which Cheek participated as a party and as an observer. Although these rulings were introduced solely on the issue of Cheek's state of mind, Cheek

contends that the district court erred by not instructing the jury that each opinion only related to his state of mind after he became aware of it. In other words, he contends that the jury should have been instructed that this evidence could not be considered with respect to every count.

It is not clear whether this objection was raised by Cheek at trial. Whether considered under plain error or abuse of discretion standards of review, however, the contention is without merit. The district court specifically instructed the jury: Each count and the evidence relating to it should be considered separately and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count. Tr. at 1991.

" 'Whether a jury has been properly instructed is to be determined not upon consideration of a single paragraph, sentence, phrase or word, but upon the charge as a whole.' " Doerr, 886 F.2d at 960 (quoting Alexander, 743 F.2d at 478). So long as the instructions " 'treat the issues fairly and accurately,' they will not be disturbed on appeal." Id. (quoting Thibodeaux, 758 F.2d at 202).

Cheek makes no specific allegations that any of the instructions given by the judge were not "fair and accurate." Instead, he makes the bald assertion that, because there was no instruction that each reference to a previous court opinion could relate only to specific charges, the jury could have improperly considered them. We disagree. The instruction given by the district court as to each separate count seems eminently sufficient.

IV.

After his second trial, Cheek was ordered to pay a fine, although no fine was imposed after his first trial. We now must consider whether the imposition of the fine upon retrial violated his due-process rights under the Fifth Amendment. North Carolina v. Pearce, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969).

In Pearce, 395 U.S. at 726, the Court created a presumption of vindictiveness when a defendant is given a greater sentence by the same sentencing authority after a retrial, unless the reason for doing so "affirmatively appears." The holding in Pearce has been severely limited by subsequent judgments of the Court. In Texas v. McCullough, 475 U.S. 134, 89 L. Ed. 2d 104, 106 S. Ct. 976 (1986), the Court held that the presumption of vindictiveness is not present when a different judge imposes the second sentence. In such circumstances, "a sentence 'increase' cannot truly be said to have taken place." Id. at 140. The Court reasoned that the "vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial." Id. at 138.

Because Cheek was tried and sentenced by a different judge in his second trial, the presumption of vindictiveness is not present. When, as here, there is no reasonable likelihood of vindictiveness, the burden is on defendant to prove actual vindictiveness. Alabama v. Smith, 490 U.S. 794, 799-800, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) (citing Wasman v. United States, 468 U.S. 559, 569, 82 L. Ed. 2d 424, 104 S. Ct. 3217 (1984)). We are persuaded that the appellant did not meet his burden.

In the present case, we cannot say that the judge "more likely than not" was motivated by vindictiveness, because there was sufficient justification for the heavier sentence. Alabama, 490 U.S. at 802. Judge Zagel identified two aggravating facts that arose subsequent to Cheek's original trial, justifying the higher sentence: In acting as his own counsel, he repeatedly refused to comply with the judge's rulings during the trial, and he demonstrated what the court described as his "hypocrisy" in saying that he was willing to abide by the Supreme Court's judgment and then refusing to do so. For example, at sentencing the district court stated: His basic reason for not paying the taxes, not filing the returns were because of beliefs about the constitutionality of the tax system. At the very best the permitted defense, one about statutory confusion, was if made at all, made only in the most cursory fashion. Indeed, Mr. Cheek himself characterized during his testimony as his various constitutional views being the primary views and the statutory considerations being secondary ones. Secondary is a very charitable characterization of it from the point of view of Mr. Cheek's testimony. So I think what was at the heart of his view of his position remained the constitutional issues. And he took the position in the course of his testimony and perhaps he even took this position at the first trial, I don't know, that he was pursuing his views and pursuing his claim until such time as somebody showed him an opinion of the Supreme Court of the United States that said he was wrong. It's an argument with some powerful appeal to a jury, which does not frequently understand that Supreme Court opinions are not the only thing you have to obey. Mr. Cheek I think had some difficulty

accepting that he had to obey decisions other than Supreme Court . . . But in this case what became clear at this trial is that there was an opinion of the Supreme Court of the United States that did tell him after the first trial that his views were not a defense. In fact, you can look at the language of the Supreme Court and draw, I think, a fairly clear inference that the Supreme Court thought his arguments were worthless. And yet despite that opinion, which was unusual for any case, directed expressly to Mr. Cheek, because it was an opinion in his case, he still persisted. And what concerns me is that there is significant evidence that his long standing assertion, made perhaps at the first trial and certainly made at this trial, that he was perfectly willing to abide by the decisions of the Supreme Court of the United States was an act of hypocrisy. Tr. at 2015-16. In addition, the court told Cheek: You were in this particular area kind of a hard-case criminal. You just wouldn't stop. You wouldn't listen. You wouldn't listen to the IRS. You wouldn't listen to the courts. You simply engaged in stubborn and willful refusal to obey the law. Tr. at 2036.

The record fully supports the district court's findings. Accordingly, we find no due process violation.

V.

Finally, Cheek argues that the trial did not commence in time and that he was, therefore, entitled to a dismissal of the indictment. Section 3161(e) of the Speedy Trial Act requires that a trial "shall commence within seventy days from the date the action occasioning the retrial has become fin l." 18 U.S.C. @ 3161(e). The parties agree that

the speedy trial clock began to run on May 29, 1991, when the mandate issued and the case was remanded by this court. It ended 222 days later on January 6, 1992, the first day of the retrial. We now must consider the time excludable under the Speedy Trial Act computation.

The parties agree that the following time periods are excluded under the Act: July 17, 1991 to July 19, 1991 July 19, 1991 to August 2, 1991 August 15, 1991 to August 23, 1991 August 23, 1991 to September 23, 1991 September 24, 1991 to November 4, 1991 Appellant's Br. at 35. Thus, the parties agree that a total of 99 days should be excluded, leaving 123 days in dispute. The government contends that all but 50 of the 123 days are excludable under Section 3161(h) and that, therefore, the trial was commenced within the time period required.

A.

First, the government contends that the period from June 17 to July 2 should be excluded under Section 3161(h)(1)(G), which provides for "delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure." 18 U.S.C. @ 3161(h)(1)(G). According to the government, these 16 days related to the intradistrict transfer of Cheek's case from Judge Plunkett to Judge Zagel pursuant to local District Court General Rule 44. On June 17, the district court issued a notice to the parties giving them 10 days to file a joint motion agreeing that the case should be returned to the original trial judge. When no motion was filed by June 27, the case was referred to the Executive

Committee of the District Court and an order was entered on July 2 transferring the case to Judge Zagel. Cheek responds that no order was entered excluding the time, and therefore it is not excludable.

Whether the time elapsed during an intra-district transfer is excludable under Section 3161(h)(1)(G) is a question of first impression for us. It has divided the courts of appeals. Compare United States v. Glasser, 773 F.2d 1553, 1557 (11th Cir. 1985) (intra-district transfer excludable) with United States v. Penta, 898 F.2d 815, 818-19 (1st Cir.) (not excludable), cert. denied, 488 U.S. 896 (1990). We agree with the Court of Appeals for the Eleventh Circuit that the statutory language "delay resulting from any proceeding relating to the transfer of a case" is "broad enough on its face to cover delays caused by proceedings relating to the intra-district transfer of a case." 773 F.2d at 1557. Thus, the 16 days between June 17 and July 2 are excludable, leaving 37 days beyond the statutory maximum still in dispute.

B.

Next the government notes that the district court granted continuances to Cheek to obtain an attorney through the months of July and August. According to the government, the district court "inadvertently" did not issue a written order reflecting that a continuance issued on August 2 excluded time between August 3 through August 14. The government claims that the court made the required finding that the delay was in the interest of justice to give Cheek time to try to locate a lawyer. Cheek contends that because the trial court did not file an order

that this 13 day period be excluded, it cannot be excluded now.

Section 3161(h)(8)(A) specifically authorizes the exclusion of time for any delay resulting from a continuance granted by any judge if the "court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. @ 3161(h)(8)(A). We are satisfied that the record confirms the government's position. Tr. dated January 6, 1992 at 5. The 12 days between August 3 and 14 are excludable, leaving 25 days still in dispute.

C.

The government then contends that the period from October 30 through December 5 is excludable because the court had taken Cheek's numerous pretrial motions under advisement during that time, adding 31 days of excludable time. Section 3161(h)(1)(F) excludes delay "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

According to the government, on October 16 the defendant filed 24 pretrial motions, and the government filed a consolidated response to these motions on October 29. On November 12 and 13, the judge ruled on some but not all of defendant's pending pretrial motions. On December 5, the court issued a written opinion disposing

of 20 of the defendant's pretrial motions.[5] United States v. Cheek, No. 87 CR 161, 1991 WL 287034 (N.D. Ill. Dec. 5, 1991). Although Cheek filed 24 pretrial motions on one day, he contends that the court was required to rule on all of them within 30 days, citing Section 3161(h)(1)(J) "delay attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." The court took 50 days to do so.

The government concedes that this period is longer than the 30-day period described in Section 3161(h)(1)(J), but contends that the entire period is excludable under the law of this circuit.

Previous judgments of this court demonstrate that Cheek's argument is overly technical and totally unacceptable. In United States v. Tibboel, 753 F.2d 608, 612 (7th Cir. 1985), we held that in a case of multiple pretrial motions the limitation is not 30 days but "reasonable promptness." We concluded that the district court would not have been acting unreasonably if it decided the

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[5] Among the 20 motions addressed by Judge Zagel was a motion to "exclude all non-white jurors for cause" on the grounds that blacks were not originally included in the Constitution and would thus be incapable of applying notions of original intent. A similar motion was filed by Cheek prior to his first trial. In that instance, he filed a motion demanding an "all white Christian male judge." When this motion was denied without comment by the court, Cheek filed an emergency request for a writ with five Associate Justices and the Chief Justice of the Supreme Court seeking a stay of all proceedings in the district court until a written order had been issued. Given this history, Judge Zagel was well advised to take the time to reduce his judgment to writing in order to avoid further delays.

defendant's seven pretrial motions within 42 days of filing. See also United States v. Latham, 754 F.2d 747, 753 (7th Cir. 1985) (68 days is a reasonable amount of time for the district court to consider eight pre-trial motions).

Here, 50 days is not an unreasonable amount of time for the district court to decide 24 pretrial motions. Therefore, an additional 31 days should be excluded. According to our calculations, the subtraction of an additional 31 days leaves less than 70 days between our remand and the subsequent trial.

The trial judge did not err by denying the defendant's motion to dismiss the case for violation of the Speedy Trial Act. The defendant's trial was held within 70 days of the remand, excluding delays allowed under the statute.

We have considered all the contentions raised by the appellant. To the extent not discussed herein, his other arguments have been considered and rejected.

The judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
JAN 26 1994
OFFICE OF THE CLERK

(2)

No. 93-861

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN L. CHEEK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it could consider the reasonableness of petitioner's claimed beliefs in deciding whether he actually held those beliefs in good faith.

2. Whether the district court properly excluded a pamphlet published by petitioner that included an annotated copy of the Constitution and several writings by petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	10
Cheek v. *United States*, 498 U.S. 192 (1991)	2, 5, 6, 7, 8, 11
Daubert v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)	11
Hamling v. *United States*, 418 U.S. 87 (1974)	10
Kaisha v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993)	9
North Carolina v. *Pearce*, 395 U.S. 711 (1969)	6
United States v. *Barnett*, 945 F.2d 1296 (5th Cir. 1991), cert. denied, 112 S. Ct. 1487 (1992)	8, 9
United States v. *Castell*, 584 F.2d 87 (5th Cir. 1978), cert. denied, 440 U.S. 925 (1979)	11
United States v. *Collins*, 920 F.2d 619 (10th Cir. 1990), cert. denied, 111 S. Ct. 2022 (1991)	8
United States v. *Lovasco*, 431 U.S. 783 (1977)	10
United States v. *Pomponio*, 429 U.S. 10 (1976)	6, 7
United States v. *Powell*, 955 F.2d 1206 (9th Cir. 1991)	8
United States v. *Turano*, 802 F.2d 10 (1st Cir. 1986)	8

Statutes and rule:

26 U.S.C. 6020	5, 9
26 U.S.C. 7201	2
26 U.S.C. 7203	2
Fed. R. Evid. 403	10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-23, is reported at 3 F.3d 1057.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. The petition for a writ of certiorari was filed on November 22, 1993 (a Monday). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203, and three counts of willfully attempting to evade and defeat his income taxes, in violation of 26 U.S.C. 7201. This Court reversed the court of appeals' affirmance of those convictions, holding that the district court had erred in instructing the jury that a person's belief that he is not obligated to pay taxes must be objectively reasonable in order to negate willfulness. *Cheek* v. *United States*, 498 U.S. 192, 203 (1991). Following a retrial, the jury again convicted petitioner on all counts. He was sentenced to a year and a day in prison, to be followed by five years' probation, and he was ordered to pay a $62,000 fine. Pet. App. 3, 6. The court of appeals affirmed. *Id.* at 23.

1. Until 1979, petitioner, a pilot for American Airlines, had filed annual federal income tax returns. Thereafter, he ceased filing returns, with the exception of a frivolous return he filed in 1982. Petitioner also began claiming a steadily escalating number of withholding allowances on Form W-4. Before 1980, he claimed 25 withholding allowances; in 1980, he increased the number to 39. Although the IRS informed petitioner that claiming 39 withholding allowances was unacceptable, he later elevated the figure to 60. In December 1980, petitioner met with a tax attorney who worked for American Airlines. The attorney informed petitioner that he was not exempt from the withholding requirements of the Internal Revenue Code. Nevertheless, petitioner submitted W-4 forms in 1981, 1982, 1983, and 1984 claiming "exempt" status. Pet. App. 4.

When the IRS instructed American Airlines not to honor those W-4 forms, petitioner sued American Airlines. The district court dismissed petitioner's complaint as frivolous and ruled that the employer could properly withhold taxes from his wages. Pet. App. 4-5. In 1982, petitioner filed a petition in the United States Tax Court, in which he claimed, *inter alia*, that he was not a "taxpayer," that his salary was not wages, and that he was not subject to income taxes because he was a "sovereign individual." The tax court informed petitioner that his arguments were frivolous, that they were contrary to law, and that the Supreme Court and every other court that had addresssed the issue had rejected those arguments. Gov't C.A. Br. 5-6.

Petitioner also sued various IRS employees, claiming that his wages were not taxable income and seeking a refund of the taxes that had been withheld. The district court dismissed petitioner's suit as frivolous, noting that petitioner's identical claims in a previous action had all been rejected. The court also fined petitioner $10,000 for "his repeated abuse of the judicial system for the pursuit of frivolous cases." Gov't C.A. Br. 6-7; Pet. App. 2 n.1, 5.

In addition, petitioner attended the criminal trial of a fellow American Airlines pilot, Charles Dare Schaut, which resulted in convictions for tax offenses. Petitioner was present when the trial judge instructed the jury that Schaut's wages as an American Airlines pilot were income. Gov't C.A. Br. 7.

2. During petitioner's second trial, the district court instructed the jury that willfulness "means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires; in other words, [petitioner] knew he was required by law to file an income tax return and failed to do so, that is, with the purpose either to disobey or disregard the Internal

Revenue Code or regulations." Tr. 1980. In describing the tax obligations imposed by the Internal Revenue Code, the court informed the jury that (Tr. 1980-1981):

> A person liable to tax under the Internal Revenue Code must include the information required by the Internal Revenue Forms and Regulations promulgated by the Secretary.
>
> The provision in Title 26, United States Code, Section 6020, that permits the Secretary of the Treasury to prepare a tax return for an individual who has not filed is irrelevant and does not negate in any way the obligation of individual taxpayers to file their returns.

The court also noted that part of petitioner's defense theory was that, "based on his legal research and study, [and] information and materials provided to him, he in good faith misinterpreted and misunderstood" his obligations under the Internal Revenue Code. Tr. 1988. After setting forth additional portions of petitioner's theory of defense in some detail (Tr. 1988-1989), the court instructed (Tr. 1989):

> A defendant does not act willfully if he believes in good [faith] that he is acting within the law or that his actions comply with the law. A good faith belief is one that is honestly and genuinely held. Therefore, if [petitioner] actually believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to willfully evade or defeat taxes or to willfully fail to file tax returns. This is so even if [petitioner's] belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether [petitioner's] stated * * * belief about the tax

statutes was reasonable as a factor in deciding whether he held that belief in good faith.

3. The court of appeals affirmed. The court rejected petitioner's claim that the district court had erred in refusing to instruct the jury regarding his reliance-on-advice-of-counsel defense. Pet. App. 8. The court held that because there was no evidence that petitioner fully and accurately disclosed his tax status to any attorney or that he acted in accordance with any attorney's advice, the district court properly refused to instruct the jury on the defense that petitioner had relied on the advice of counsel. *Id.* at 10.

The court of appeals also held that the district court had properly instructed the jury on the element of willfulness, and that the court's instruction was consistent with this Court's decision in *Cheek* v. *United States*, *supra*. Pet. App. 13. The court rejected petitioner's contention that the jury should not have been permitted to consider the reasonableness of his beliefs in determining whether he held such beliefs in good faith, noting that in *Cheek*, 498 U.S. at 203-204, the Court had remarked that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws." Pet. App. 13.

The court of appeals further held that, contrary to petitioner's claim, the district court did not instruct the jury that petitioner's views on the applicability of 26 U.S.C. 6020 were "irrelevant"; it merely instructed that petitioner's views about that provision "did not accu-

rately reflect the state of the law" with respect to petitioner's legal obligations to file a return. Pet. App. 14.[1]

ARGUMENT

1. Petitioner contends (Pet. 9-13) that he was convicted "pursuant to jury instructions that contravened this Court's explicit holding" in *Cheek* v. *United States*, *supra*. Pet. 9. In particular, petitioner takes issue with the trial court's instruction permitting the jury to consider whether his claimed belief about the tax laws was reasonable in deciding whether he held that belief in good faith. In fact, the challenged instruction is entirely consistent with *Cheek*'s definition of willfulness under the criminal tax statutes.

In *Cheek*, the Court reviewed the court of appeals' holding that a misunderstanding of one's obligations under the tax laws must be objectively reasonable in order to negate willfulness in a criminal tax prosecution. This Court rejected that formulation, holding that under the tax laws, willfulness connotes "the voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. at 201; see also *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). The Court thus held that whether or not a mistaken belief is objectively reasonable, a good faith belief that one has complied with the tax laws negates willfulness and consti-

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[1] Petitioner also challenged the fact that the sentence imposed after his second trial, although essentially the same as his prior sentence, also included a fine. Pet. App. 6. In rejecting petitioner's claim that the fine was imposed in violation of his due process rights, the court of appeals held that since petitioner was tried and sentenced by a different judge in his second trial, the presumption of vindictiveness set forth in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was not applicable, and that petitioner failed to meet his burden of showing actual vindictiveness. Pet. App. 16.

tutes a defense to a tax offense charge. *Cheek* v. *United States*, 498 U.S. at 202-203.

In this case, the district court's "willfulness" instruction corresponded to the Court's formulation in *Cheek*.[2] Furthermore, although an additional instruction regarding good faith is not required,[3] the district court specifically informed the jury that a good faith belief that a person's actions complied with his obligations under the tax laws would negate a showing of willfulness, and "[t]his is so even if [petitioner's] belief was not objectively reasonable." Tr. 1989. The court then added that, "[n]evertheless, you may consider whether [petitioner's] stated * * * belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith." *Ibid.*

Contrary to petitioner's contention (Pet. 10), the final portion of that instruction does not conflict with this Court's holding in *Cheek*. In *Cheek*, the Court expressly recognized that, in determining a person's state of mind, the jury may consider whether the person's beliefs were reasonable:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple dis-

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[2] The trial court instructed the jury that willfulness "means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires; in other words, [petitioner] knew he was required by law to file an income tax return and failed to do so, that is, with the purpose either to disobey or disregard the Internal Revenue Code or regulations." Tr. 1980.

[3] When the jury is properly instructed with regard to willfulness, an additional instruction on good faith is unnecessary. See *Cheek*, 498 U.S. at 201, citing *Pomponio*, 429 U.S. at 13.

> agreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

498 U.S. at 203-204. In view of the Court's statement, an instruction that informs the jury that it may consider whether a defendant's belief was reasonable in determining willfulness does not constitute legal error. Nothing in that instruction suggested that petitioner's beliefs must have been reasonable to constitute a defense, and other portions of the instructions made clear that there was no such requirement.

Petitioner is not helped by his reliance (Pet. 9-10) on *United States* v. *Powell*, 955 F.2d 1206, 1211 (9th Cir. 1991). In that case, the court of appeals held that the jury *may* consider the "reasonableness" of a defendant's alleged beliefs in determining whether he actually held them. *Id.* at 1212. Other court of appeals decisions are to the same effect. See *United States* v. *Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991) (upholding instruction allowing jury to consider the grounds on which a defendant based his claim of good faith in determining whether he actually acted in good faith), cert. denied, 112 S. Ct. 1487 (1992); *United States* v. *Collins*, 920 F.2d 619, 622-623 (10th Cir. 1990) (upholding instruction that "if you regard [the defendant's] belief as being highly unreasonable, you may consider this along with all other evidence on the question of whether his belief was indeed genuine or merely feigned"), cert. denied, 111 S. Ct. 2022 (1991); *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986) ("The jury * * * must use whatever evidence they can to determine what [defendant] believed. The more unreasonable the defendant's alleged belief that he did not have to file a tax return, the less likely he, in fact, held that belief. Stating this obvious point does not eliminate the

requirement that, in order to convict, the jury find that defendant knew he was legally required to file.").

Petitioner also takes issue (Pet. 10) with the following instruction (Tr. 1980-1981):

> The provision in Title 26, United States Code, Section 6020, that permits the Secretary of the Treasury to prepare a tax return for an individual who has not filed is irrelevant and does not negate in any way the obligation of individual taxpayers to file their returns.

He asserts (Pet. 10) that that instruction "ruled out, as a matter of law, jury determination of a crucial belief of [petitioner] about what the tax statutes required of him." Petitioner, however, takes the instruction out of context. The instruction was part of a series of instructions concerning the duty to file returns; it simply pointed out that Section 6020 was irrelevant to the existence of that duty. As the court of appeals determined (Pet. App. 14), it was not error for the district court to instruct the jury with respect to the requirements of law. The district court did not instruct the jury, or in any way suggest, that petitioner's *beliefs* about Section 6020 were irrelevant to his contention that he acted in good faith. See *United States* v. *Barnett*, 945 F.2d at 1300.[4]

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[4] Petitioner also asserts (Pet. 11-12) that the district court's imposition of a fine was designed to teach him a harsh lesson for seeking review in this Court, prevailing, and defending himself at his retrial. Because that question is neither presented by the petition nor fairly included in the questions presented, it is not before this Court for review. See *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). Nor would it raise an issue meriting review. As the court of appeals pointed out (Pet. App. 17-18), the district judge identified two aggravating facts arising since petitioner's original trial that justified a higher sentence. First, petitioner re-

2. Petitioner contends (Pet. 13-17) that the district court erred in excluding evidence concerning his study of the Constitution. His only specific complaint concerns the exclusion of a booklet he had independently published containing an annotated copy of the Constitution, an accompanying recitation of petitioner's view of court decisions, and "a brief essay by [petitioner]." Pet. 15. Petitioner argues that his booklet was an important component of his good-faith defense and should have been admitted. That claim, however, was not raised or decided in the court of appeals and is thus not properly before this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the district court properly excluded petitioner's pamphlet. The admission or exclusion of evidence is a matter within the discretion of the district court, see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974), and the district court here properly exercised its discretion under Fed. R. Evid. 403. The district court found that petitioner's constitutional booklet was "clearly misleading" (Pet. 15), and there is no basis for overturning that finding. Evidence that petitioner had diligently read the Constitution would not have negated the evidence that petitioner was well acquainted with the Internal Revenue Code and the obligations it imposed on him. And, as this Court explicitly held in *Cheek*, a de-

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peatedly refused to comply with the judge's rulings during the trial. Second, petitioner demonstrated what the trial judge characterized as hypocrisy in saying he was willing to abide by decisions of this Court and then refusing to do so. The district court noted that petitioner had pursued a defense based on a claimed belief that the tax laws were unconstitutional even though this Court had held in petitioner's case that such a belief was not a defense.

fendant's belief that the requirements of the tax laws are unconstitutional does not negate willfulness in a tax prosecution. 498 U.S. at 205-206. Accordingly, petitioner's "views about the [constitutional] validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury." *Id.* at 206.

As petitioner notes (Pet. 8), the district court admitted a Government Printing Office copy of the Constitution as a jury exhibit. It is unclear how petitioner's study of the Constitution was relevant to his claim (Pet. 14) "that he was attempting in good faith to discover and understand" his obligations under the federal tax laws. But assuming the evidence relating to his study of the Constitution was relevant, the jury was given the constitutional text that petitioner studied; the only material that the court excluded was petitioner's commentary on it, which the court found to be misleading. The court was entitled to exclude evidence that was likely to mislead the jury. See, *e.g.*, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993); *United States* v. *Castell*, 584 F.2d 87, 89 (5th Cir. 1978), cert. denied, 440 U.S. 925 (1979).[5] Petitioner has thus failed to show why

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[5] In passing, petitioner states (Pet. 15-16) that "[a]nother example" of his good faith attempt to avoid intentionally violating any legal requirement was his request to an attorney, Robert Collins, for an opinion letter regarding his tax liability. Petitioner does not raise any issue regarding his purported reliance-on-advice-of-counsel defense as a question presented, see Pet. i, and it is not subsumed in the issue of whether the district court correctly excluded petitioner's constitutional materials. To the extent, however, that petitioner is renewing his claim that the trial court erred in refusing to give an instruction with respect to petitioner's reliance-on-advice-of-counsel defense, the court of appeals correctly held that petitioner had not established the factual predicate for such an in-

his own out-of-court statements were in any way relevant to his defense, even assuming those statements were admissible as non-hearsay, which is doubtful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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struction to be given. Pet. App. 10. That fact-specific holding warrants no further review.

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In The

Supreme Court of the United States

October Term, 1993

JOHN L. CHEEK

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The linchpin of the respondent's Brief in Opposition to the Petition for a Writ of Certiorari is its clear misstatement of this Court's holding in *Cheek v. United States*, 498 U.S. 192 (1991). The respondent states that this Court "expressly recognized that, in determining a person's state of mind, the jury may consider whether the person's beliefs were reasonable." (Resp. 7.)

Quite to the contrary, the entire thrust of this Court's reasoning in *Cheek* was that the jury may not consider the reasonableness of the defendant's beliefs. This Court repeated this holding throughout its opinion in order to ensure that it would not be misinterpreted. Nevertheless, the respondent, and the court below, have proceeded to misinterpret it.

To be sure, this Court, in giving reasons for reaching its conclusion in *Cheek*, made an observation about probable jury behavior that was addressed to the legal community reading its decision. This Court said:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

498 U.S. at 203-04. This text constitutes part of the Supreme Court's reasoning to support is holding – reasoning addressed to the legal community that reads and studies the decisions of this Court. The text clearly does not constitute a prescription for instructions to be given

to a jury. One does not have to invoke the deconstructionist philosophy of Jacques Derrida to observe that texts are often intended to address different audiences. The primary audience of this Court's reasoned decisions is the legal community, including the courts below. On occasion this Court may address a different and more particular audience, such as it did in framing a "Miranda warning" for police officers or in prescribing an exact form of instruction to be made to juries in particular circumstances. But it is clearly impermissible in interpreting this Court's decisions to confuse and conflate the different audiences. It is clearly impermissible and fallacious to move from this court's reasoning in support of its decision to a verbal formula for the implementation of its decision. Yet this false move is apparently what the respondent made in order to reach its extraordinary conclusion that juries may consider whether the defendant's state of mind was reasonable – a conclusion that is the exact opposite of what this Court held in *Cheek*.

With respect to this critical interpretive issue, the petitioner respectfully suggests a simple analogy. Suppose that this Court were to hold, in an opinion regarding the use of testimony that stemmed from an unconstitutional search or seizure:

> Juries must be instructed to disregard inadvertent testimony if it was the fruit of an unconstitutional search or seizure, even though this kind of testimony is undoubtedly the best and most certain proof of a defendant's guilt.

Suppose that a trial judge in the next case instructs the jury in the following words:

> I want you to disregard the statement you've just heard, even though it is undoubtedly the best and most certain proof of the defendant's guilt in this case.

Under the respondent's argument in its Brief in Opposition, this would be a perfectly good instruction. However, the respondent would clearly be conflating and confusing two different audiences – the legal community reading this Court's opinion, and the trial judge seeking a form of wording that can be used to instruct juries – and thereby deliberately misinterpreting the entire point of the court's reasoning.

The foregoing is exactly what the respondent has done in its Brief in Opposition. It has lifted a sentence from this Court's reasoning in support of its holding – the holding that an objective standard of reasonableness cannot be part of the jury's factual determination whether a particular defendant knows his or her legal duty – and transformed the sentence into a jury instruction that eviscerates that very holding.

This Court's important decision in *Cheek v. United States*, 498 U.S. 192 (1991), should not be undermined by the respondent's approach, which reflects the approach taken by the Court of Appeals below. After all, the respondent will be prosecuting many other cases of statutory crimes. It has now clearly signalled, by its Brief in Opposition, that it regards a "reasonableness" instruction perfectly proper. There is no doubt that such an instruction could provide for the respondent a wide avenue of escape from the burden imposed upon prosecutors by this Court in its *Cheek* decision to prove factually that defendants know they violated a statute.

This Court's development of scienter in the area of statutory crime following *Cheek* was applied most notably and recently in *Ratzlaf v. United States*, 1994 U.S. Lexis 936. The Supreme Court should grant Mr. Cheek's petition for a writ of certiorari in order to protect the core holding of its decision in *Cheek*. In the alternative, this court should summarily reverse the decision below of the Court of Appeals of the Seventh Circuit.

Respectfully submitted,

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